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Political  
implications

Be right?

Mr Giffard

FALKLAND ISLANDS: REFERENCE TO THE INTERNATIONAL COURT OF JUSTICE

PROBLEM

1. This note considers whether we might seek a Security Council resolution which would either:

- (a) refer the question of sovereignty over the Falkland Islands and their Dependencies to the International Court of Justice (ICJ) for an 'advisory opinion'; or
- (b) call on Argentina and the UK to refer the sovereignty dispute to the ICJ;

in both cases an essential condition being that Argentina would first withdraw her forces and that some suitable arrangements be made for the administration of the Islands in the meanwhile, since we would be unable to take any military action while the Court was considering the case.

2. This note has been discussed with but not yet fully cleared by Legal Advisers

CONCLUSIONS

- 3. (a) Having achieved their primary objective, the Argentines are unlikely to entrust the issue to international arbitration or to agree to withdraw without considerable material pressure;
- (b) There is therefore a risk that the Security Council could find itself considering a move to refer the sovereignty issue to the ICJ whilst the Argentines remain in possession. This would be difficult, though not impossible, for us to resist and would exclude any attempts to recover the Islands by force;
- (c) [REDACTED]
- (d) The possible presentational gains of manoeuvring the Argentines into taking the onus of rejecting recourse to a peaceful settlement may thus be outweighed by the disadvantages.

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/BACKGROUND

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## BACKGROUND

4. Advisory Opinions

5. An advisory opinion can only be sought by an organ of the UN, eg the Security Council. Unlike a contentious case before the Court, a request for an advisory opinion does not require the consent of the parties. The Court would be likely to try to respond to the request but might find that it was prevented from doing so in the event of total Argentine non-cooperation.

6. Neither the Security Council nor the parties to any dispute are legally bound to accept an advisory opinion. A Security Council resolution calling for compliance would not be binding either. But if we rejected an ICJ opinion adverse to us, we should incur some odium.

Reference by the Parties

7. A resolution of type (b) in paragraph 1 above would not entitle the Court to consider the matter unless both parties agreed. If they did, the Court's judgement would be binding. Accordingly, Argentina would be most unlikely to agree.

## ARGUMENT

8. The Security Council having now demanded that the Argentines withdraw their troops, a few days will have to elapse in order to establish that they are not willing to do so. When this is clear, it would be natural for us to go back to the Council for a second resolution, which could include one of the above proposals. *the may*

9. The purpose of promoting a resolution in either of the above terms would be firstly to increase the pressure of Argentina to withdraw; secondly, to demonstrate HMG's willingness to exhaust all available international machinery in an attempt to find a peaceful solution; and, failing agreement on withdrawal, to demonstrate that it is Argentina that is frustrating peaceful settlement.

10. It would obviously take immense pressure to get the Argentinians to withdraw as part of this package. They have secured their objectives, and can count on international opprobrium decreasing. They might argue that the matter should be referred to the ICJ whilst they remained in possession; or they might reject all further international involvement in what would be, to them, a domestic matter. This would at least leave our way open for other methods - for which reason one would expect the Argentines to avoid such clear-cut rejection.

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11. There is therefore an obvious risk that the two parts of the package could be decoupled in the Security Council. Any opening suggestion that reference to the ICJ should be preceded by an Argentinian withdrawal could, in the course of negotiation, be diluted to the point where, for instance, the Argentines would promise to consider withdrawing, in the event of the Court's opinion going against them. They would thus have the advantage of undisturbed possession for as long as it took the Court to reach an opinion (a process which the Argentinians could to some extent help to prolong) whilst HMG would be in practice debarred from taking any other measures to resolve the situation while the matter was internationally sub judice. The veto would however probably be available to us to prevent an advisory opinion being requested in these circumstances.

12. Any move on our part to respond to an appeal to refer the dispute to the ICJ or to seek an advisory opinion as a means to a peaceful settlement could have implications for other dependent territories over which there is a dispute with a neighbouring state and in particular Gibraltar. But in the mid-sixties we made an offer - since lapsed - to the Spaniards to submit our sovereignty to the ICJ's verdict.

13. Some members of the Security Council may object on legal grounds to a resolution that sought to refer a dispute between two sovereign states to the ICJ. The Soviet Union, in particular, are prone to assert that in international law a dispute between two sovereign states must be settled by direct negotiation and that supra-national bodies should not be put in a position to arbitrate.

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